

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION**

PATTY CARRADINE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.: 1:02-CV-122
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

**MEMORANDUM OF DECISION AND ORDER**

**I. INTRODUCTION**

Plaintiff Patty Carradine (“Carradine”) seeks attorney’s fees<sup>1</sup> to be paid by Defendant Commissioner of Social Security, Jo Anne B. Barnhart (“Commissioner”), pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.

For the following reasons, Carradine’s request is GRANTED.

**II. PROCEDURAL BACKGROUND**

On March 3, 1994, Carradine filed an application for Social Security Disability Insurance Benefits (“DIB”). The claim was denied throughout the administrative process. Seeking judicial review of the Commissioner’s decision, Carradine then filed a Complaint in this Court, which issued a decision on October 23, 2002, affirming the Commissioner. The Seventh Circuit disagreed, reversed the decision of this Court and remanded the case to the Social Security Administration. *Carradine v. Barnhart*, 360 F.3d 751 (7<sup>th</sup> Cir. 2004.) On June 10, 2004, Carradine filed a motion seeking an award of attorney’s fees pursuant to the EAJA.

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<sup>1</sup>All parties have consented to the Magistrate Judge. *See* 28 U.S.C. § 636(c).

### III. ANALYSIS

The EAJA provides that a district court may award attorney's fees where (1) the claimant is a prevailing party; (2) the government's position was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is submitted to the court within thirty days of final judgment and is supported by an itemized statement. 28 U.S.C. § 241(d)(1)(A), (B); *Golembiewski v. Barnhart*, – F.3d –, available at 2004 WL 1925425 (7<sup>th</sup> Cir. Aug. 31, 2004). Carradine is the prevailing party, no special circumstances are alleged, and the fee application was timely. The only remaining question is whether the Commissioner's position was justified.

The Commissioner's position is substantially justified if her conduct has a "reasonable basis in law and fact, that is, if a reasonable person could believe the position was correct." *Golembiewski* at \*2 (quoting *Pierce v. Underwood*, 487 U.S. 552, 556 n.2 (1988)). The Commissioner bears the burden of proving that her position was substantially justified. *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7<sup>th</sup> Cir. 1994). If the government's pre-litigation conduct or its litigation position is not substantially justified, the court may award EAJA fees. *Id.* However, the court is to make only one determination for the entire action. *Id.* A decision by an administrative law judge ("ALJ") constitutes part of the agency's pre-litigation conduct. *Golembiewski* at \*2 (citing *Sutton v. Chater*, 944 F. Supp. 638, 639 (N.D. Ill. 1996)).

The Seventh Circuit's three-part test for reviewing EAJA petitions requires the Commissioner to show that its position was grounded in (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable

connection between the facts alleged and the legal theory propounded. *Golembiewski* at \*2 (quoting *United States v. Hallmark Constr.*, 200 F.3d 1076, 1080 (7<sup>th</sup> Cir. 2000)). When the court of appeals reverses a decision of the Commissioner, the district court must analyze the actual merits of the government's litigation position. *Id.* Even so, merely because the government loses a case, there is no presumption that the government's position was not substantially justified. *Berman v. Schweiker*, 713 F.2d 1290, 1295 n. 18 (7<sup>th</sup> Cir. 1983). Nevertheless, strong language against the government's position in an opinion discussing the merits of a key issue is evidence in support of an award of EAJA fees. *Golembiewski* at \*2 (quoting *Hallmark Constr.*, 200 F.3d at 1079).

For example, In *DeFrancesco ex rel. of DeFrancesco v. Sullivan*, 803 F. Supp. 1332, 1336-37 (N.D. Ill. 1992), the court awarded fees under the EAJA where the language of the appellate court's opinion indicated that the Secretary's decision was overturned because of serious flaws in fact and law. *Id.* at 1336. The Seventh Circuit found the Secretary's position inconsistent, illogical, untenable and contrary to regulations and Social Security Rulings. *Id.* at 1337.

Likewise, in *Sutton*, 944 F. Supp at 645, the court held that where the ALJ failed to develop the record in a way that would support his decision, the decision did not have a reasonable basis in fact, and therefore, the position of the ALJ and Commissioner was not substantially justified.

Similarly, in *Steele v. Barnhart*, No. 99-C-5455 2002 WL 31478268 (N. D. Ill. Nov. 5, 2002), the court also awarded the plaintiff's request for attorney's fees even when it had initially upheld the decision of the ALJ. The court determined that the government's position was not

substantially justified by analyzing the opinion of the Seventh Circuit, which found that the ALJ failed to develop the record supporting his decision, and the decision did not have a reasonable basis in fact. *See also Banks v. Barnhart*, No. 01-C-382, 2003 WL 22019796 (N.D. Ill. Aug. 26, 2003) (awarding plaintiff attorney's fees under EAJA because government's position was not substantially justified where on appeal, the Seventh Circuit described ALJ's analysis as cursory, woefully deficient, and unaccompanied by an analysis of the relevant evidence).

Here, the administrative law judge ("ALJ") found that Carradine was not entitled to DIB because her physical ailments, although severe, were not a plausible cause of the disabling pain to which Carradine testified. *Carradine*, 360 F.3d at 755. The ALJ reached this conclusion by failing to account for the possibility that her pain could be attributable to a psychiatric condition (i.e., somatization) as opposed to a physical condition. *Id.* In addition, the ALJ improperly evaluated the evidence by failing to consider the difference between Carradine's ability to engage in sporadic physical activities and being able to work eight hours a day for five consecutive days of the week. *Id.* The Seventh Circuit found only a scintilla of evidence in the record to support the ALJ's determination that she lacked credibility about her pain and physical symptoms. *Id.* Indeed, the Seventh Circuit ultimately concluded that "an administrative agency's decision cannot be upheld when the reasoning process employed by the decision maker exhibits deep logical flaws, . . ." *Carradine*, 360 F.3d at 756. An opinion that exhibits "deep logical flaws" is not substantially justified, and a litigation position that defends such an opinion is similarly lacking in justification.

In an attempt to support its position, the Government merely relies on the opinion of the dissent, *Carradine*, 360 F.3d at 756-781 (Coffey, J., dissenting), as well as the decision of this

Court and two ALJs, who all agreed with the initial determination of the Commissioner to deny Carradine's DIB application. This reasoning fails to account for the actual merits of the Government's litigation position. *See United States v. Paisley*, 957 F.2d 1161, 1167 (4<sup>th</sup> Cir. 1992) (stating that the substantial justification issue cannot be turned into an up-or-down judgment on the relative reasoning powers of Article III judges who may have disagreed on the merits of a government litigation position). Actual analysis of the government's position reveals that it was not substantially justified. As the Seventh Circuit noted, Social Security Regulations state that psychological as well as anatomical or physiological abnormalities may provide the basis of finding that a medical impairment could reasonably be expected to produce pain or the symptoms alleged. *Carradine*, 360 F.3d at 754; 20 C.F.R. § 404.1529(b). Even though the ALJ acknowledged this regulation, he took a position contrary to it in spite of Carradine's considerable evidence. Thus, the Commissioner has failed to meet her burden of establishing that her position was substantially justified.

Having concluded that an EAJA award is proper, the Court must now determine whether the \$16,573.70 Carradine seeks in fees is reasonable. The EAJA provides a statutory cap of \$125 per hour on attorney's fees that the court may increase if justified by an increase in the cost of living or special factors. 28 U.S.C. § 2412(d)(2)(A). Carradine calculates her attorney's hourly fees by adjusting the statutory figure upward on a month-by-month basis linked to increases in the cost of living index since March of 1996 when the EAJA was last amended. (Pl.'s Mem. at 4-5.); *see also Banks* at \*5 (Brown, J.)(approving similar methodology). The Commissioner does not dispute the hourly rate, costs or computation of fees Carradine seeks, *see Golembiewski* at \*1 (awarding plaintiff's fee request where government failed to complain about

computation), and accordingly, the Court grants both Carradine's initial motion for attorney's fees (Docket #30) and her supplemental motion (Docket #42) thereby awarding her the \$16,573.70 she seeks.

SO ORDERED.

Enter for this 14th day of September, 2004.

s/Roger B. Cosbey  
Roger B. Cosbey,  
United States Magistrate Judge